

# **WEST VIRGINIA LEGISLATURE**

## **2021 REGULAR SESSION**

**Introduced**

### **House Bill 3218**

BY DELEGATES HOTT AND WESTFALL

[Introduced March 16, 2021; Referred to the  
Committee on the Judiciary]

1 A BILL to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, relating  
2 to eliminating the cause of action for deliberate intent for injuries that arise during the  
3 course of employment.

*Be it enacted by the Legislature of West Virginia:*

#### **ARTICLE 4. DISABILITY AND DEATH BENEFITS.**

##### **§23-4-2. Disbursement where injury is self-inflicted or intentionally caused by employer; legislative declarations and findings; "deliberate intention" defined.**

1 (a) Notwithstanding anything contained in this chapter, no employee or dependent of any  
2 employee is entitled to receive any sum under the provisions of this chapter on account of any  
3 personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of  
4 the employee. Upon the occurrence of an injury which the employee asserts, or which reasonably  
5 appears to have, occurred in the course of and resulting from the employee's employment, the  
6 employer may require the employee to undergo a blood test for the purpose of determining the  
7 existence or nonexistence of evidence of intoxication: *Provided*, That the employer must have a  
8 reasonable and good faith objective suspicion of the employee's intoxication and may only test  
9 for the purpose of determining whether the person is intoxicated. If any blood test for intoxication  
10 is given following an accident, at the request of the employer or otherwise, and if any of the  
11 following are true, the employee is deemed intoxicated and the intoxication is the proximate cause  
12 of the injury:

13 (1) If a blood test is administered within two hours of the accident and evidence that there  
14 was, at that time, more than five hundredths of one percent, by weight, of alcohol in the  
15 employee's blood; or

16 (2) If there was, at the time of the blood test, evidence of either on or off the job use of a  
17 nonprescribed controlled substance as defined in the West Virginia Uniform Controlled  
18 Substances Act, West Virginia Code §60A-2-201, *et seq.*, Schedules I, II, III, IV and V.

19 (b) For the purpose of this chapter, the commission may cooperate with the Office of

20 Miners' Health, Safety and Training and the State Division of Labor in promoting general safety  
21 programs and in formulating rules to govern hazardous employments.

22 (c) If injury results to any employee from the deliberate intention of his or her employer to  
23 produce the injury or death, the employee, or, if the employee has been found to be incompetent,  
24 his or her conservator or guardian, may recover under this chapter and bring a cause of action  
25 against the employer, as if this chapter had not been enacted, for any excess of damages over  
26 the amount received or receivable in a claim for benefits under this chapter. If death results to any  
27 employee from the deliberate intention of his or her employer to produce the injury or death, the  
28 representative of the estate may recover under this chapter and bring a cause of action, pursuant  
29 to section six, article seven of chapter fifty-five of this code, against the employer, as if this chapter  
30 had not been enacted, for any excess of damages over the amount received or receivable in a  
31 claim for benefits under this chapter. To recover under this section, the employee, the employee's  
32 representative or dependent, as defined under this chapter, must, unless good cause is shown,  
33 have filed a claim for benefits under this chapter.

34 (d)(1) It is declared that enactment of this chapter and the establishment of the workers'  
35 compensation system in this chapter was and is intended to remove from the common law tort  
36 system all disputes between or among employers and employees regarding the compensation to  
37 be received for injury or death to an employee except as expressly provided in this chapter and  
38 to establish a system which compensates even though the injury or death of an employee may  
39 be caused by his or her own fault or the fault of a co-employee; that the immunity established in  
40 §23-2-6 and §23-2-6A of this code is an essential aspect of this workers' compensation system;  
41 that the intent of the Legislature in providing immunity from common lawsuit was and is to protect  
42 those immunized from litigation outside the workers' compensation system except as expressly  
43 provided in this chapter; that, in enacting the immunity provisions of this chapter, the Legislature  
44 intended to create a legislative standard for loss of that immunity of more narrow application and  
45 containing more specific mandatory elements than the common law tort system concept and

46 standard of willful, wanton and reckless misconduct; and that it was and is the legislative intent to  
47 promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted  
48 authority of this section is or is not prohibited by the immunity granted under this chapter.

49 (2) The immunity from suit provided under this section and under §23-2-6 and §23-2-6A  
50 of this code may be lost only if the employer or person against whom liability is asserted acted  
51 with "deliberate intention". This requirement may be satisfied only if

52 (A) ~~It~~ it is proved that the employer or person against whom liability is asserted acted with  
53 a consciously, subjectively and deliberately formed intention to produce the specific result of injury  
54 or death to an employee. This standard requires a showing of an actual, specific intent and may  
55 not be satisfied by allegation or proof of: (i) Conduct which produces a result that was not  
56 specifically intended; (ii) conduct which constitutes negligence, no matter how gross or  
57 aggravated; or (iii) willful, wanton or reckless misconduct. ~~or~~

58 (B) ~~The trier of fact determines, either through specific findings of fact made by the court~~  
59 ~~in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the~~  
60 ~~following facts are proven:~~

61 (i) ~~That a specific unsafe working condition existed in the workplace which presented a~~  
62 ~~high degree of risk and a strong probability of serious injury or death;~~

63 (ii) ~~That the employer, prior to the injury, had actual knowledge of the existence of the~~  
64 ~~specific unsafe working condition and of the high degree of risk and the strong probability of~~  
65 ~~serious injury or death presented by the specific unsafe working condition.~~

66 (l) ~~In every case actual knowledge must specifically be proven by the employee or other~~  
67 ~~person(s) seeking to recover under this section, and shall not be deemed or presumed: *Provided,*~~  
68 ~~That actual knowledge may be shown by evidence of intentional and deliberate failure to conduct~~  
69 ~~an inspection, audit or assessment required by state or federal statute or regulation and such~~  
70 ~~inspection, audit or assessment is specifically intended to identify each alleged specific unsafe~~  
71 ~~working condition.~~

72 ~~(II) Actual knowledge is not established by proof of what an employee's immediate~~  
73 ~~supervisor or management personnel should have known had they exercised reasonable care or~~  
74 ~~been more diligent.~~

75 ~~(III) Any proof of the immediate supervisor or management personnel's knowledge of prior~~  
76 ~~accidents, near misses, safety complaints or citations from regulatory agencies must be proven~~  
77 ~~by documentary or other credible evidence.~~

78 ~~(iii) That the specific unsafe working condition was a violation of a state or federal safety~~  
79 ~~statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety~~  
80 ~~standard within the industry or business of the employer.~~

81 ~~(I) If the specific unsafe working condition relates to a violation of a commonly accepted~~  
82 ~~and well-known safety standard within the industry or business of the employer, that safety~~  
83 ~~standard must be a consensus written rule or standard promulgated by the industry or business~~  
84 ~~of the employer, such as an organization comprised of industry members: *Provided*, That the~~  
85 ~~National Fire Protection Association Codes and Standards or any other industry standards for~~  
86 ~~Volunteer Fire Departments shall not be cited as an industry standard for Volunteer Fire~~  
87 ~~Departments, Municipal Fire Departments and Emergency Medical Response Personnel as an~~  
88 ~~unsafe working condition as long as the Volunteer Fire Departments, Municipal Fire Departments~~  
89 ~~and the Emergency Medical Response Personnel have followed the Rules that have been~~  
90 ~~promulgated by the Fire Commission.~~

91 ~~(II) If the specific unsafe working condition relates to a violation of a state or federal safety~~  
92 ~~statute, rule or regulation that statute, rule or regulation:~~

93 ~~(a) Must be specifically applicable to the work and working condition involved as~~  
94 ~~contrasted with a statute, rule, regulation or standard generally requiring safe workplaces,~~  
95 ~~equipment or working conditions;~~

96 ~~(b) Must be intended to address the specific hazard(s) presented by the alleged specific~~  
97 ~~unsafe working condition; and,~~

98 ~~(c) The applicability of any such state or federal safety statute, rule or regulation is a matter~~  
99 ~~of law for judicial determination.~~

100 ~~(iv) That notwithstanding the existence of the facts set forth in subparagraphs (i) through~~  
101 ~~(iii), inclusive, of this paragraph, the person or persons alleged to have actual knowledge under~~  
102 ~~subparagraph (ii) nevertheless intentionally thereafter exposed an employee to the specific~~  
103 ~~unsafe working condition; and~~

104 ~~(v) That the employee exposed suffered serious compensable injury or compensable~~  
105 ~~death as defined in section one, article four, chapter twenty-three as a direct and proximate result~~  
106 ~~of the specific unsafe working condition. For the purposes of this section, serious compensable~~  
107 ~~injury may only be established by one of the following four methods:~~

108 ~~(I) It is shown that the injury, independent of any preexisting impairment:~~

109 ~~(a) Results in a permanent physical or combination of physical and psychological injury~~  
110 ~~rated at a total whole person impairment level of at least thirteen percent (13%) as a final award~~  
111 ~~in the employees workers' compensation claim; and~~

112 ~~(b) Is a personal injury which causes permanent serious disfigurement, causes permanent~~  
113 ~~loss or significant impairment of function of any bodily organ or system, or results in objectively~~  
114 ~~verifiable bilateral or multi-level dermatomal radiculopathy; and is not a physical injury that has no~~  
115 ~~objective medical evidence to support a diagnosis; or~~

116 ~~(II) Written certification by a licensed physician that the employee is suffering from an~~  
117 ~~injury or condition that is caused by the alleged unsafe working condition and is likely to result in~~  
118 ~~death within eighteen (18) months or less from the date of the filing of the complaint. The certifying~~  
119 ~~physician must be engaged or qualified in a medical field in which the employee has been treated,~~  
120 ~~or have training and/or experience in diagnosing or treating injuries or conditions similar to those~~  
121 ~~of the employee and must disclose all evidence upon which the written certification is based,~~  
122 ~~including, but not limited to, all radiographic, pathologic or other diagnostic test results that were~~  
123 ~~reviewed.~~

124 ~~(III) If the employee suffers from an injury for which no impairment rating may be~~  
125 ~~determined pursuant to the rule or regulation then in effect which governs impairment evaluations~~  
126 ~~pursuant to this chapter, serious compensable injury may be established if the injury meets the~~  
127 ~~definition in subclause (l)(b).~~

128 ~~(IV) If the employee suffers from an occupational pneumoconiosis, the employee must~~  
129 ~~submit written certification by a board certified pulmonologist that the employee is suffering from~~  
130 ~~complicated pneumoconiosis or pulmonary massive fibrosis and that the occupational~~  
131 ~~pneumoconiosis has resulted in pulmonary impairment as measured by the standards or methods~~  
132 ~~utilized by the West Virginia Occupational Pneumoconiosis Board of at least fifteen percent (15%)~~  
133 ~~as confirmed by valid and reproducible ventilatory testing. The certifying pulmonologist must~~  
134 ~~disclose all evidence upon which the written certification is based, including, but not limited to, all~~  
135 ~~radiographic, pathologic or other diagnostic test results that were reviewed: *Provided*, That any~~  
136 ~~cause of action based upon this clause must be filed within one year of the date the employee~~  
137 ~~meets the requirements of the same.~~

138 ~~(C) In cases alleging liability under the provisions of paragraph (B) of this subdivision:~~

139 ~~(i) The employee, the employee's guardian or conservator, or the representative of the~~  
140 ~~employee's estate shall serve with the complaint a verified statement from a person with~~  
141 ~~knowledge and expertise of the workplace safety statutes, rules, regulations and consensus~~  
142 ~~industry safety standards specifically applicable to the industry and workplace involved in the~~  
143 ~~employee's injury, setting forth opinions and information on:~~

144 ~~(I) The person's knowledge and expertise of the applicable workplace safety statutes,~~  
145 ~~rules, regulations and/or written consensus industry safety standards;~~

146 ~~(II) The specific unsafe working condition(s) that were the cause of the injury that is the~~  
147 ~~basis of the complaint; and~~

148 ~~(III) The specific statutes, rules, regulations or written consensus industry safety standards~~  
149 ~~violated by the employer that are directly related to the specific unsafe working conditions:~~

150 ~~Provided, however, That this verified statement shall not be admissible at the trial of the action~~  
151 ~~and the Court, pursuant to the Rules of Evidence, common law and subclause two-c,~~  
152 ~~subparagraph (iii), paragraph (B), subdivision (2), subsection (d), section two, article four, chapter~~  
153 ~~twenty-three of this code, retains responsibility to determine and interpret the applicable law and~~  
154 ~~admissibility of expert opinions.~~

155 (ii) ~~No punitive or exemplary damages shall be awarded to the employee or other plaintiff;~~

156 (iii) ~~Notwithstanding any other provision of law or rule to the contrary, and consistent with~~  
157 ~~the legislative findings of intent to promote prompt judicial resolution of issues of immunity from~~  
158 ~~litigation under this chapter, the employer may request and the court shall give due consideration~~  
159 ~~to the bifurcation of discovery in any action brought under the provisions of subparagraphs (i)~~  
160 ~~through (v), of paragraph (B) such that the discovery related to liability issues be completed before~~  
161 ~~discovery related to damage issues. The court shall dismiss the action upon motion for summary~~  
162 ~~judgment if it finds pursuant to rule 56 of the rules of civil procedure that one or more of the facts~~  
163 ~~required to be proved by the provisions of subparagraphs (i) through (v), inclusive, paragraph (B)~~  
164 ~~of this subdivision do not exist, and the court shall dismiss the action upon a timely motion for a~~  
165 ~~directed verdict against the plaintiff if after considering all the evidence and every inference~~  
166 ~~legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines~~  
167 ~~that there is not sufficient evidence to find each and every one of the facts required to be proven~~  
168 ~~by the provisions of subparagraphs (i) through (v), inclusive, paragraph (B) of this subdivision;~~  
169 ~~and~~

170 (iv) ~~The provisions of this paragraph and of each subparagraph thereof are severable from~~  
171 ~~the provisions of each other subparagraph, subsection, section, article or chapter of this code so~~  
172 ~~that if any provision of a subparagraph of this paragraph is held void, the remaining provisions of~~  
173 ~~this act and this code remain valid.~~

174 (e) ~~Any cause of action brought pursuant to this section shall be brought either in the circuit~~  
175 ~~court of the county in which the alleged injury occurred or the circuit court of the county of the~~



176 ~~employer's principal place of business. With respect to causes of action arising under this chapter,~~  
177 ~~the venue provisions of this section shall be exclusive of and shall supersede the venue provisions~~  
178 ~~of any other West Virginia statute or rule.~~

179       (f) (e) The reenactment of this section in the regular session of the Legislature during the  
180 year 2015 does not in any way affect the right of any person to bring an action with respect to or  
181 upon any cause of action which arose or accrued prior to the effective date of the reenactment.

182       (g) (f) The amendments to this section enacted during the 2015 session of the Legislature  
183 shall apply to all injuries occurring on or after July 1, 2015.

NOTE: The purpose of this bill is to eliminate the cause of action for deliberate intent.

Strike-throughs indicate language that would be stricken from a heading or the present law  
and underscoring indicates new language that would be added.